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No. 91-707

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN B. LENNES, JR., COMMISSIONER, DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA, ET AL., PETITIONERS

v.

BOISE CASCADE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA), which supersedes state laws insofar as they "relate to" employee benefit plans, 29 U.S.C. 1144(a), including certain "apprenticeship or other training programs," 29 U.S.C. 1002(1), preempts the application of a Minnesota occupational licensing law limiting the number of apprentice pipefitters at a jobsite.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portion of ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a); the definition of "employee welfare benefit plan" set out in Section 3(1) of ERISA, 29 U.S.C. 1002(1); the pertinent portion of Section 302(c) of the Labor-Management Relations Act, 29 U.S.C. 186(c), which is cross-referenced in Section 3(1) of ERISA; and the portions of the Secretary of Labor's regulatory definition of "employee welfare benefit plan" relating to apprenticeship programs and scholarship funds are reprinted in the appendix to this brief.

STATEMENT

1. For many years, Minnesota has regulated high pressure pipefitting. The reason is simple: improperly installed piping can explode and cause serious injury to both workers and the public. The State's regulatory scheme (1) requires pipefitters to satisfy occupational licensing requirements, and (2) establishes a code of technical safety standards enforced through issuance of state permits and inspections. Under these regulations, pipefitters must be licensed to install high-pressure piping, and unlicensed apprentices must work under the supervision of a licensed journeyman. An employer who hires unlicensed pipefitters is not required to establish an apprenticeship training program, but apprentices must register with the State and take the state licensing examination after four years of experience in the trade. Pet. App. 3a-5a.

Minnesota also has a separate regulatory scheme governing apprenticeship programs, which are approved by the State if they meet specified standards. That regulatory regime, which implements the National Apprenticeship Act of 1937 (the "Fitzgerald Act"), 29 U.S.C. 50, administered by the U.S. Department of Labor, is purely voluntary. Minnesota's voluntary apprenticeship standards for pipefitters have traditionally included a minimum jobsite ratio of journeymen to apprentices, in accordance with Department of Labor regulations. See 29 C.F.R. 29.5(b)(7). Any employer may establish an apprenticeship program; historically, however, only unions and unionized employers did so. Most pipefitter apprentices in Minnesota participated in those union-sponsored programs. Pet. App. 4a-5a, 18a.

In the mid-1980s, non-union employers began establishing apprenticeship training programs that did not comply with the State's voluntary standards, including the jobsite ratios. In response, the State in 1990 promulgated a mandatory rule—the "three-to-one rule"—requiring employers using unlicensed pipefitters to employ one licensed pipefitter for the first trainee and a ratio of three licensed pipefitters for each additional trainee. Pet. App. 4a-6a.

2. Respondents include four companies, Boise Cascade Corporation, BE&K Construction Company, Relco Unisystems Corporation, and Mid-States Mechanical Services, Inc., that employ and train pipefitters within Minnesota. Each employer has established (or proposed) an apprenticeship program that provides classroom instruction and on-the-job training for apprentice pipefitters. None of these programs has been approved by the State, and respondents typically employ a much higher ratio of apprentices to journeyman pipefitters than permitted by the State's three-to-one rule. Pet. App. 2a, 18a-19a & n.6.

To comply with Minnesota's new rule, respondents would have to incur significant expense for the obvious reason that journeyman pipefitters must be paid higher wages than apprentices. The four companies, joined by three apprentice pipefitters, accordingly brought suit in federal district court against the Commissioner of Minnesota's Department of Labor and Industry. The action sought an injunction against enforcement of the three-to-one rule on the ground that it is preempted by ERISA and the National Labor Relations Act (NLRA). The Minnesota Mechanical Contractors Association intervened as a defendant in support of the State. Pet. App. 28a, 38a n.3, 43a-45a.

3. Respondents filed a motion for a preliminary injunction, and the State filed a motion for summary judgment. The district court did not rule on the preliminary injunction motion; instead, the court granted summary judgment in favor of the State based upon its conclusion that the three-to-one rule is not preempted by federal law. For purposes of the State's summary judgment motion, the parties stipulated that respondents' pipefitter apprenticeship programs are "employee welfare benefit plan[s]" as defined in Section 3(1) of ERISA, 29 U.S.C. 1002(1). Pet. App. 44a.[1] In light of the parties' stipula-

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[1] ERISA defines an "employee welfare benefit plan" to include (A) "apprenticeship or other training programs" and (B) "any benefit described" in Section 302(c) of the Labor-Management Relations Act (LMRA), 29 U.S.C. 186(c). Section 302(c) of the LMRA in turn refers to 'trust fund[s] established * * * for the

tion, the district court did not consider whether respondents' programs were subject to coverage under ERISA.

Instead, the only ERISA question presented to the district court was whether Minnesota's three-to-one rule "relates to" an employee benefit plan within the meaning of ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a). That section provides that ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The district court recognized that ERISA preemption is broad and not limited to laws specifically designed to affect employee benefit plans. It noted that the test established by this Court provides that a state law "relates to" an employee benefit plan under Section 514(a) of ERISA "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); see Pet. App. 23a. The district court added, however, that ERISA does not preempt all state laws that merely "affect" employee benefit plans, particularly in areas of traditional state regulation such as occupational training and public safety. Pet. App. 23a-24a.

Reviewing the case under the analytical framework of *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), the district court concluded that the three-to-one rule was not preempted. The court reasoned that Minnesota's rule neither requires employers to establish employee benefit plans, nor is specifically designed to affect such plans, and it neither alters the terms of eligibility or the amount of benefits available to plan participants, nor imposes any funding, vesting, reporting, or enforcement requirements that would interfere with ERISA's substantive provisions. Pet. App. 27a. The court recognized that the jobsite ratio would have what it termed an "incidental effect" on existing apprenticeship plans because the rule would limit the number of participants and affect how

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purpose of * * * defraying costs of apprenticeship or other training programs."

on-the-job training could be done. *Id.* at 27a-28a. Nevertheless, the district court found that requirement to be comparable to other state occupational licensing requirements, such as years of experience and passing an examination, that ERISA would not preempt. *Id.* at 30a. Accordingly, the district court concluded that the rule was not preempted by Section 514(a) of ERISA because it is "a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs." *Ibid.*[2]

3. The Eighth Circuit reversed. The court held that the jobsite ratio rule is preempted by ERISA because it "relates to" the apprenticeship training programs provided by the four respondent companies. Unlike the district court, the court of appeals concluded that the three-to-one rule was specifically designed to affect employee benefit plans because its purpose is to require employers to train apprentices in the manner the rule prescribes. Pet. App. 10a-11a. In the court of appeals' view, "the fact that the minimum jobsite ratio rule is part of an apprenticeship program and thus part of an employee benefit 'plan' under ERISA, [and] not merely an employee benefit, distinguishes the present case from *Fort Halifax*." *Id.* at 10a. The court also noted that the Minnesota rule could expose employers to conflicting or inconsistent state and local regulation, which ERISA preemption was designed to avoid. *Id.* at 11a.

The court therefore determined that the effect of the three-to-one rule on apprenticeship plans was more than "incidental," and could not be characterized as "tenuous, remote, or peripheral" under *Shaw*, 463 U.S. at 100 n.21, so as to permit the conclusion that the rule does not

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[2] The district court went on to conclude that the three-to-one rule is not preempted by the NLRA. Pet. App. 31a-34a. The court of appeals, which held that the three-to-one rule is preempted by ERISA, did not address the NLRA question. Nor do we.

"relate to" employee benefit plans. Pet. App. 12a. Instead, the court concluded that "[t]he minimum jobsite ratio rule directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of the apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters." *Ibid.*

DISCUSSION

We do not believe that, in its present posture, this case is suitable for review. As we explain below, it is likely that further development of the record will establish that the apprenticeship programs operated by respondents are not covered by ERISA. If the programs are not subject to ERISA, then the Minnesota rule is not preempted insofar as it relates to those programs. This potentially dispositive threshold issue was not addressed by either the parties or the courts, because the issue of statutory coverage was conceded for purposes of the State's motion for summary judgment. In our view, this Court should decline to reach the question whether Minnesota's assertion of regulatory authority is improper, since resolution of this preemption issue may be unnecessary. Cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948) (declining review on the merits where the record on summary judgment was incomplete).

In any event, we do not share the State's view that a pressing need exists for this Court to reconsider the general framework for analyzing ERISA preemption questions. This is the first decision to address preemption of jobsite supervisory ratios or other training requirements contained in state occupational licensing laws. Not only is the issue quite fresh in the lively world of ERISA-related litigation, but the lower courts' erroneous assumption that ERISA covered these programs may well have skewed their analysis of the preemption issue. The upshot is this: in its present posture, this case does not

present an appropriate occasion for a fundamental reconsideration of this Court's approach to ERISA preemption.

1. a. Section 3(1) of ERISA, 29 U.S.C. 1002(1), defines an "employee welfare benefit plan" as "any plan, fund or program * * * established or maintained by an employer or by an employee organization, or by both * * * for the purpose of providing for its participants or their beneficiaries" certain enumerated benefits. Included among the benefits listed in Section 3(1)(A) are "apprenticeship or other training programs" and "scholarship funds." Section 3(1)(B) further provides that a plan providing "any benefit described" in Section 302(c) of the Labor-Management Relations Act (LMRA), 1947, 29 U.S.C. 186(c), is covered by ERISA. Section 302(c)(6), in turn, defines benefits to include "a trust fund established * * * for the purpose of * * * defraying costs of apprenticeship or other training programs" and Section 302(c)(7) includes a "trust fund" established to provide "scholarships."

ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by ERISA. The statutory language establishes that the Minnesota rule is not preempted unless respondents' apprenticeship programs are "employee benefit plans" within the meaning of ERISA. Such a showing is a threshold prerequisite to preemption under Section 514(a).

b. In this case, it appears that neither the parties nor the courts below conducted any inquiry into coverage. They simply assumed, based on the statutory definition, that any "apprenticeship or other training program" is an employee benefit plan covered by ERISA. That assumption is wrong. The Secretary's coverage regulations and advisory opinions carve out a large exemption that may well include all of the pipefitter training programs operated by respondents.

First, the regulations exclude from coverage employee benefit plans that provide compensation for on-the-job

training. See 29 C.F.R. 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] could be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). That regulatory exclusion is just one part of a broader coverage exclusion for a variety of "payroll practices" (such as overtime pay, sick pay, and vacation pay) which amount to nothing more than payment of ordinary compensation out of the employer's general assets. 29 C.F.R. 2510.3-1(b). Indeed, another part of the payroll practices regulation (the exclusion of vacation pay) has been upheld by this Court. *Massachusetts* v. *Morash*, 490 U.S. 107 (1989). Accordingly, in the Secretary of Labor's view, on-the-job training does not normally constitute an ERISA plan.

Second, the Secretary's regulations exclude various plans that provide for classroom instruction. Specifically, the regulations exclude so-called "[u]nfunded scholarship programs," including "tuition and education expense refund program[s], under which payments are made solely from the general assets of an employer or employee organization." 29 C.F.R. 2510.3-1(k); see 40 Fed. Reg. 34,527 (1975). The Department of Labor has also issued an advisory opinion stating that an in-house professional development program maintained by an accounting firm to provide continuing education for its licensed accountants, financed by the firm's general assets, is not an employee welfare benefit plan as defined in ERISA. ERISA Advisory Opinion No. 83-32A; see also ERISA Advisory Opinion No. 76-01 (tuition refunds to bank employees paid from the bank's general assets do not constitute a covered plan). Accordingly, in the Secretary's view, un-

funded classroom training programs, whether provided directly by an employer or purchased from an educational institution, do not constitute ERISA plans.

If neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan, then an unfunded program providing both types of training is plainly not an ERISA plan either. On the other hand, apprenticeship programs and scholarship programs that are separately funded—such as joint apprenticeship trusts and scholarship trusts established under Section 302(c) of the LMRA—are covered by ERISA. The rationale for such a distinction is explained in *Massachusetts* v. *Morash*, 490 U.S. at 112-119. In *Morash*, the Court approved the Secretary's similar determination that only funded—and not unfunded—vacation pay arrangements were covered by ERISA. The Court stated that "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Id.* at 115. The existence of separate plan assets makes funded plans susceptible to the kinds of fiduciary abuses that ERISA was designed to prevent. The Court accordingly upheld the Secretary's payroll practice regulation insofar as it excluded unfunded vacation benefits from coverage.

In reaching that conclusion, the Court also noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." 490 U.S. at 118-119. Similarly, if all employer-provided training is covered by ERISA, employees would have the right to bring benefit claims or fiduciary breach claims in federal court under Section 502(a) of ERISA, 29 U.S.C. 1132(a), each time their employer denied them an opportunity to attend a training course. ERISA was not intended to sweep so broadly; the Secretary quite properly exercised her rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135,

to define the proper scope of the term "employee welfare benefit plan."

As this Court has recognized, the Secretary's coverage regulations are entitled to deference. *Massachusetts* v. *Morash*, 490 U.S. at 115-118. Excluding unfunded apprenticeship and scholarship programs from ERISA coverage is a permissible interpretation of the statutory language and is fully consistent with Congress's intent. The LMRA was amended in 1959 to permit employers and unions to establish joint trust funds "for the purpose of * * * defraying costs of apprenticeship or other training programs." Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 505, 73 Stat. 537-539, adding Section 302(c)(6) of the LMRA, 29 U.S.C. 186(c)(6). The language incorporated in the ERISA definition, "apprenticeship or other training programs," mirrors that employed in the LMRA. This congruence of language suggests that Congress was referencing the form of separately funded apprenticeship and training trusts traditionally sponsored by unions. Similarly, Section 3(1) of ERISA refers to "scholarship funds," while Section 302(c)(7) allows a union to establish a "trust fund" to provide "scholarships." See Pub. L. No. 91-86, 83 Stat. 133 (1969). Accordingly, both the statutory language and its enactment history support the Secretary's regulations limiting ERISA coverage to apprenticeship programs and scholarship programs that are separately funded.[3]

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[3] In *Massachusetts* v. *Morash*, the Court rejected the argument that the reference to "vacation benefits" in Section 3(1)(A) of ERISA must include unfunded programs because the cross-reference to Section 302(c) of the LMRA in Section 3(1)(B) already covered funded vacation plans (since Section 302(c)(6) mentions "a trust fund established" to provide "pooled vacation" benefits). The Court instead recognized that Congress was "not concerned with duplication" in drafting Section 3(1). 490 U.S. at 114 n.9. Similarly, the fact that the cross-reference to Section 302(c) of the LMRA in Section 3(1)(B) brings funded apprenticeship and scholarship programs within ERISA's coverage does not preclude the Secretary's

c. In this case, the court of appeals' decision is silent as to the funding status of the apprenticeship and training programs operated by the four employer respondents. However, the record includes affidavits submitted by each respondent describing its program. Those affidavits reveal that three of the four employers do not sponsor a funded apprenticeship training program. Relco and Mid-States simply provide on-the-job training and pay for classroom instruction to prepare apprentice pipefitters for the state licensing examination. See Affidavits of Loren Corle, owner of Relco (Jan. 19, 1990), and Kent Durenberger, President of Mid-States (Jan. 19, 1990). Boise Cascade had proposed, but not implemented, an apprenticeship training program while this case was pending before the district court. See Affidavit of Bob Anderson, Public Affairs Manager (Jan. 22, 1990).[4] Based on affidavits presented to the district court, it seems clear that none of those three employers currently offers an apprenticeship training program that is an employee benefit plan under Section 3(1) of ERISA, as construed by the Secretary.

For a number of years, BE&K has offered an extensive apprenticeship program covering a variety of trades. BE&K typically includes in its contracts a ten-cent per payroll hour charge earmarked to pay for training and educating its employees, and maintains an in-house account that it calls the BE&K Training and Education Fund. See Affidavit of W. Douglas Cross, Vice-President of Operations (Jan. 22, 1990). It does not appear that this is a trust fund within the meaning of ERISA. In ERISA Advisory Opinion No. 83-32A, the Department of Labor determined that a similarly financed plan was excluded

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interpretation of "apprenticeship or other training programs" and "scholarship funds" in Section 3(1)(A). To the contrary, reading Section 3(1) as a whole supports the Secretary's decision that only funded apprenticeship and scholarship plans are subject to ERISA.

[4] We were informed that Boise Cascade has not implemented the proposed apprenticeship program described in its filing in the district court, but instead is currently considering offering apprenticeship training through a union fund.

from coverage. That opinion involved an accounting firm whose branch offices contributed a percentage of their net fees to their national office, which used the funds to provide continuing education programs. The Department concluded that earmarking revenues in this manner does not involve a "trust arrangement," subject to ERISA's coverage. There is, accordingly, substantial reason to doubt whether the BE&K program is covered; and further factual development in the district court would be necessary to resolve that issue.

In short, it is not apparent that any of the four employers sponsor apprenticeship programs that constitute "employee welfare benefit plans" within the meaning of Section 3(1) of ERISA. In light of the threshold coverage question, review of the preemption issue presented by petitioners is not warranted at this time.[5]

2. a. With respect to the question presented, petitioners recognize that this Court has repeatedly held that a

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[5] It appears that the coverage issue may be raised by petitioners on remand. Petitioners apparently conceded ERISA coverage only for the purpose of their own summary judgment motion, Pet. App. 44a, and all that has happened in this case thus far is that the district court granted summary judgment in favor of the State, despite that concession, and the court of appeals reversed. Respondents did not move for summary judgment. In any event, as a general rule, concessions that a party makes in support of its own motion for summary judgment do not carry over and support a cross-motion for summary judgment by the opposing party. 6 James W. Moore *et al., Moore's Federal Practice* ¶ 56.13, at 56-176 to 56-177 (2d ed. 1988); *Vetter* v. *Frosch*, 599 F.2d 630, 632 (5th Cir. 1979); *Begnaud* v. *White*, 170 F.2d 323, 327 (6th Cir. 1948). Accordingly, it appears that the district court, on remand, may take evidence and decide the coverage issue on the merits. Similarly, the court of appeals has discretion to reconsider the preemption question in light of the coverage issue. 1B James W. Moore *et al., Moore's Federal Practice* ¶ 0.404[1], at 117-124 (2d ed. 1983). This Court would be free to consider both the coverage and preemption issues (assuming both were preserved) if certiorari were granted following an appeal from a judgment on remand. *Id.* at ¶ 0.404[4.-6], at 140-141; *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365-366 n.1 (1973).

state law "relates to" an employee benefit plan under Section 514(a), and is therefore preempted, "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97; *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990). Petitioners contend that the result in this case "demonstrates that this formulation of ERISA preemption doctrine simply does not provide the lower courts with sufficient guidance." Pet. 17. In their view, a new test should be formulated that limits the effect of Section 514(a). Regardless of whether a new "test" is needed, this case does not, in any event, present an appropriate occasion on which to reconsider this Court's interpretation of Section 514(a).

By preempting state laws "insofar as they * * * relate to" ERISA plans, Congress broadly shielded such plans from state regulation. Under Section 514(a), preemption is not limited to "state laws specifically designed to affect employee benefit plans" or to "state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like." *Shaw*, 463 U.S. at 98; *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 408 (1990). The purpose of the state law is not dispositive; ERISA preempts state laws that intrude either directly or indirectly upon the area of exclusive federal concern. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-525 (1981); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985). Preemption is virtually required if the state law makes a specific "reference to" ERISA plans or is "specifically designed to affect" such plans. *Mackey* v. *Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988); *Ingersoll-Rand*, 111 S. Ct. at 483. Even if the state law does not expressly refer to substantive matters regulated by ERISA, preemption is nevertheless required if the State thereby subjects employers and plan administrators to conflicting state regulations burdening the administration of nationwide plans. *FMC*, 111 S. Ct. at 408; *Fort Halifax*, 482 U.S. at 10.

Contrary to petitioners' assertions, however, not all state laws imposing additional costs or administrative

burdens on employee benefit plans are preempted. *Mackey*, 486 U.S. at 831; *Ingersoll-Rand*, 111 S. Ct. at 483. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.[6] In general, courts have declined to preempt "laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental." *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir.), cert. denied, 493 U.S. 811 (1989). This exception to the general rule of preemption "follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted § 514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction." *Rebaldo* v. *Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).[7] Ultimately, however, the fact that

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[6] Applying this exception, courts have found no ERISA preemption of state laws involving matters as varied as garnishment of welfare plan benefits to collect debts of plan participants (*Mackey*); escheat of uncollected ERISA benefit checks to a State (*Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142 (2d Cir.), cert. denied, 493 U.S. 811 (1989)); a city income tax of general application affecting employee contributions to benefit plans (*Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550 (6th Cir. 1987)); a state law imposing fiduciary duties on corporate officers for the benefit of shareholders, including ERISA plans (*Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 479 U.S. 1034, 1089 (1987)); a law prescribing hospital rates for inpatient care, including the rates charged to plans (*Rebaldo* v. *Cuomo*, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985)); and application of a state fair employment practices law to a plan in its capacity as an employer (*Lane* v. *Goren*, 743 F.2d 1337 (9th Cir. 1984)).

[7] Accordingly, this Court has assumed that ERISA plans are subject to many "run-of-the-mill state-law claims such as unpaid

a state law is one of general application representing a traditional exercise of state authority will not insulate it from preemption if the law significantly affects employee benefit plans. See, *e.g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987) (preempting a state common law action for improper processing of a claim for benefits from an ERISA plan).

Whether a state law "relate[s] to" an employee benefit plan in a manner that requires preemption is admittedly not always easy to determine. But Section 514(a) does not create the "regulatory 'black hole' of mammoth proportions" that petitioners allege. Pet. 15. That allegation, and the hypothetical examples supporting it, are based in part on petitioners' misunderstanding of the scope of the definition of "employee welfare benefit plan." For example, petitioners' charge that most state rules governing nursing trainees would be preempted under the logic of the court of appeals' decision, Pet. 14, is incorrect if only funded apprenticeship programs are subject to ERISA.

Moreover, the court of appeals' overbroad assumptions about ERISA coverage also appear to have skewed its preemption analysis. For instance, when the court of appeals concluded that "[t]he minimum jobsite rule was specifically designed to affect employee benefit plans," Pet. App. 11a, so as to be automatically preempted under *Mackey*, it erroneously assumed that any law relating to apprenticeship or training necessarily relates to covered plans only. That is not the case. Although the Minnesota rule was plainly designed to affect on-the-job supervision and training of unlicensed pipefitters, such training will often occur outside the context of an ERISA plan.

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rent, failure to pay creditors, or even torts committed by an ERISA plan." *Mackey*, 486 U.S. at 833. The lower courts similarly have assumed that ERISA would not preempt "state laws and municipal ordinances regulating zoning, health, and safety" (*Lane* v. *Goren*, 743 F.2d at 1340); "labor laws that govern working conditions and labor costs" (*Rebaldo* v. *Cuomo*, 749 F.2d at 138); and "rent control laws that determine what employee benefit plans pay or receive for rental property" (*ibid.*).

These coverage-related factors—that the three-to-one rule affects many programs not subject to ERISA and that Congress included apprenticeship and scholarship programs in the definition of "employee welfare benefit plan" because it was concerned with regulating trust funds established to provide training—should have been considered in the preemption analysis under the standards formulated by this Court.

On the record as it now exists, however, it is difficult to determine under those standards whether the three-to-one rule is preempted insofar as it affects employee benefit plans covered by ERISA. For that reason as well as the fact that the coverage issue was not addressed by the lower courts, this case is not a suitable vehicle for reconsidering the standards established by this Court to determine whether a state law "relate[s] to" an ERISA plan.

b. Nor do we discern any pressing need to review this case. In particular, there is no conflict in the circuits regarding ERISA preemption of state apprenticeship regulations. This is the first case specifically to address state jobsite supervisory ratios or other training standards contained in state occupational licensing laws. In related cases, the Ninth and Tenth Circuits have struck down certain rules involving apprenticeship programs imposed on public works contractors by state prevailing wage and benefit laws. Thus, in *Electrical Joint Apprenticeship Comm.* v. *MacDonald*, 949 F.2d 270 (9th Cir. 1991), petition for cert. pending, No. 91-1416 (filed Feb. 3, 1992), and *National Elevator Indus., Inc.* v. *Calhoon*, 957 F.2d 1555 (10th Cir. 1992), the preempted state laws required employers to participate in state-approved apprenticeship programs in order to avoid having to pay full journeyman wages to all employees working on state public works projects. Similarly, in *Local 598* v. *J.A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir.), aff'd mem., 488 U.S. 881 (1988), the preempted state law compelled employers with state public works contracts to contribute to apprenticeship training funds at a state-mandated level. In *Hydrostorage, Inc.* v. *Northern Cal.*

Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990), the preempted state law required employers with public works contracts to: (1) establish or join apprenticeship programs complying with state-approved apprenticeship standards; (2) employ apprentices in a state-mandated minimum ratio; and (3) contribute to apprenticeship and other trust funds (or pay an equal amount to the State).[8]

While consistent with the decision below in that the Ninth and Tenth Circuits held in each case that state laws relating to apprenticeship programs were preempted, those decisions do not show that ERISA preemption is so broad that this Court must reconsider its construction of Section 514(a). In the cases decided by the Ninth and Tenth Circuits, the preempted state law required the employer to establish, join, or contribute to a funded apprenticeship plan as a condition for receiving state public works contracts. Thus, the laws in question appeared to have a close relationship to plans covered by ERISA.

Nor do the decisions in the other cases compel the conclusion that the three-to-one rule is preempted insofar as it affects funded plans in Minnesota, since the relationship of the three-to-one rule to apprenticeship training programs is somewhat more attenuated. First, the Minnesota rule does not require employers to hire any apprentices at all; an employer would be in full compliance if it used only licensed journeyman pipefitters. Second, the rule does not require employers to establish or maintain any kind of structured or formalized apprenticeship training program; it requires only that unlicensed pipefitters be supervised on the job by a certain ratio of licensed pipefitters to ensure that their work is performed properly.

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[8] Each of the decisions of the Ninth and Tenth Circuits involved funded apprenticeship programs. In *National Elevator Industry, Hydrostorage*, and *Local 598*, the state law affected traditional apprenticeship programs operated by unions. See 957 F.2d at 1558; 891 F.2d at 728; and 846 F.2d at 1217. In *Electrical Joint Apprenticeship Comm.*, the apprenticeship funds were administered by an employer trade association. See 949 F.2d at 272.

Third, the rule does not require any employer to establish or contribute to a separate apprenticeship or training fund, which, as we have stated, is a requisite for coverage under ERISA.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Contrary to petitioners' argument, Pet. 26-30, the Fitzgerald Act, 29 U.S.C. 50, and ERISA's savings clause for other federal laws, 29 U.S.C. 1144(d), have no bearing on this case. In promulgating its jobsite ratio for pipefitters, Minnesota did not purport to act under the authority of the Fitzgerald Act, but rather acted under the authority of its state occupational licensing law for pipefitters. Moreover, the State's mandatory jobsite ratio goes beyond anything required by the voluntary federal regulations, which merely provide for registered apprenticeship programs to set out a specific "numeric ratio of apprentices to journeymen, consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements." 29 C.F.R. 29.5(b)(7). Thus, preemption of the State's three-to-one rule would in no manner impair the operation of the voluntary federal program. See generally *Shaw*, 463 U.S. at 100-104. Indeed, the employers here did not even have state-registered voluntary apprenticeship programs.

APPENDIX

Section 514(a) of ERISA, 29 U.S.C. 1144(a), provides in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this [title] and [title IV] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 3(1) of ERISA, 29 U.S.C. 1002(1), provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 302(c) of the Labor-Management Relations Act, 29 U.S.C. 186(c), provides, in pertinent part:

* * * * *

> (6) * * * a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs * * *; (7) * * * a pooled or individual trust fund estab-

lished by such representative for the purpose of (A) scholarships * * *.

29 C.F.R. 2510.3-1, "employee welfare benefit plan," provides in pertinent part:

* * * * *

(b) *Payroll practices.* For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

* * * * *

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—

* * * * *

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training * * *.

* * * * *

(k) *Unfunded scholarship programs.* For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization.

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